IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 29

UNITED STATES OF AMERICA,

Appellant,

—*v.*—

CLARENCE EWELL and RONALD K. DENNIS.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLEE CLARENCE EWELL

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INDEX

	Page
Opinions Below	1
Constitutional Provisions Involved	1
Questions Presented	2
Statement	3
Summary of Argument	8
ARGUMENT:	
I. The Appeal Does Not Present a Case or Controversy and Should Be Dismissed	12
II. The District Court's Decision That the Proceedings Against the Defendant Violated the Sixth Amendment Right to Be Informed of the Nature and Cause of the Accusation Is Correct	14
III. The Appellee Was Deprived of His Right to a Speedy Trial Under the Sixth Amendment on the Charge of Selling Narcotics in Violation of Title 26 U.S.C. 4704(a)	22
A. The delay involved was substantial	23
B. The appellee has been prejudiced by the delay	27
C. The delay and the resulting prejudice was a result of the Government's conduct	30
IV. The Second Indictment Charging a Violation of 26 U.S.C. 4704(a) Violates the Double Jeopardy Protection of the Fifth Amendment	37
Conclusion	41

Page

CITATIONS

CASES:

Abbate v. *United States*, 359 U.S. 187 .....12, 30, 38, 39
Bayless v. *United States*, 147 F. 2d 169, reversed on other grounds, 150 F. 2d 236 26
Beland v. *United States*, 100 F. 2d 289, certiorari denied 306 U.S. 636 ..... 17, 18
Blockburger v. *United States*, 284 U.S. 299 ..... 15, 17
Clay v. *United States*, 326 F. 2d 196 ..... 5, 34
Collins v. *Markley*, 346 F. 2d 230 .....8, 34, 38
Downum v. *United States*, 372 U.S. 734 29
Fahy v. *Connecticut*, 375 U.S. 85 20
Fiswick v. *United States*, 329 U.S. 211 33
Frankel v. *Woodrough*, 7 F. 2d 796 ..... 26, 28
Glasser v. *United States*, 315 U.S. 60 20
Gore v. *United States*, 357 U.S. 387 ..... 4, 17
Griffin v. *California*, 380 U.S. 609 36
Hallman v. *United States*, 208 F. 2d 825 .....15, 20, 21
Hanrahan v. *United States*, 348 F. 2d 363 26
Harris v. *United States*, 359 U.S. 19 17
Hurtado v. *California*, 110 U.S. 516 29
Hutchinson v. *United States*, 345 F. 2d 964 17
In Re Neilson, 131 U.S. 176 38
Jackson v. *United States*, 325 F. 2d 477 ..... 5, 34
Jackson v. *United States*, 9/13/65 (C.A.D.C.) .. 25
Lauer v. *United States*, 320 F. 2d 187 .....5, 6, 8, 29, 31, 32, 33, 34, 35, 36, 38
Nickens v. *United States*, 323 F. 2d 808 ..... 15, 19
Petite v. *United States*, 361 U.S. 529 ..... 30, 38
Petition of Provoo, 17 F.R.D. 183 (D. Md.), *affirmed* 350 U.S. 857 .....15, 22, 27, 28, 29, 31
Pointer v. *Texas*, —— U.S. ——, 13 L.Ed. 2d 923 15
Pollard v. *United States*, 352 U.S. 354 38
Ponzi v. *Fessenden*, 258 U.S. 254 26
Powell v. *United States*, 8/30/65 (C.A.D.C.) 24, 25
Rivera v. *United States*, 318 F. 2d 606 ..... 5, 32

Page

Ross v. *United States*, 349 F. 2d 210 .....15, 16, 19, 21, 24, 25, 28
Smith v. *United States*, 360 U.S. 1 25
Taylor v. *United States*, 238 F. 2d 259 .....15, 19, 26, 27-28
United States v. *Ball*, 163 U.S. 622 26
United States v. *Brest*, 266 F. 2d 879, certiorari denied 362 U.S. 912 26
United States v. *Cruikshank*, 92 U.S. (2 Otto) 542 15
United States v. *Debrow*, 346 U.S. 374 .....5, 15, 32
United States v. *Dennis*, 242 F. Supp. 166 1
United States v. *Ewell*, 242 F. Supp. 451 1
United States v. *Lustman*, 258 F. 2d 475, certiorari denied 358 U.S. 880 28
United States v. *Morgan*, 346 U.S. 502 33
United States v. *Sabella*, 272 F. 2d 206 39
United States v. *Seeger*, 303 F. 2d 478 15
United States v. *Tateo*, 377 U.S. 463 ..... 26, 35
United States v. *United States Smelting, R & M Co.*, 339 U.S. 186 23
United States v. *Wilkins*, 348 F. 2d 844 20
Ward v. *United States*, 346 F. 2d 423 28
Williams v. *United States*, 250 F. 2d 19 28

CONSTITUTION, STATUTES AND RULES:

United States Constitution:
Article 3, Section 2 .....1, 2, 9, 14
Fifth Amendment 2, 3, 6, 12, 24, 26, 30, 37, 38, 39, 40, 41
Sixth Amendment 2, 3, 5, 6, 8, 9, 10, 13, 14, 15, 16, 19, 21, 22, 23, 24, 25, 26, 27, 30, 31, 33, 37, 38, 41
18 U.S.C. 3568 7
18 U.S.C. 4208(b) 4
21 U.S.C. 174 .....2, 3, 4, 5, 6, 7, 12, 16, 17, 20, 31, 39

Page

26 U.S.C. 4704(a) 2, 3, 4, 5, 6, 8, 10, 11, 12, 16, 17, 18, 19, 20, 22, 23, 24, 25, 30, 31, 33, 36, 37, 38
26 U.S.C. 4705(a) 2, 3, 4, 5, 6, 7, 8, 9, 12, 18, 20, 31, 37, 38, 39
26 U.S.C. 7237(a) 33
26 U.S.C. 7237(b) 4, 7
26 U.S.C. 7237(c)(1) 4, 7
26 U.S.C. 7237(d) 4, 7
28 U.S.C. 2255 ..... 5, 32, 33, 35
Revised Rules of the Supreme Court of the United States:
Rule 15(1)(c)(1) 9, 13

OTHER:

"In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant." Van Alstyne, 74 Yale Law Journal 606 (1965) 36

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Opinions Below

The opinions of the district court are reported at 242 F. Supp. 451 (S.D. Indiana), *United States* v. *Ewell;* and at 242 F. Supp. 166 (S.D. Indiana), *United States* v. *Dennis.*

Constitutional Provisions Involved

Article 3, Section 2 provides in pertinent part:

"The judicial Power shall extend to all Cases, . . . ;— to Controversies to which the United States shall be a party; . . ."

The Fifth Amendment provides in pertinent part:

"... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Sixth Amendment provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ., and to be informed of the nature and cause of the accusation; . . ."

Questions Presented

1. The Government has limited this appeal to that part of the district court's judgment dismissing Count II of a three-count indictment on the grounds that the defendant's right under the Sixth Amendment to a speedy trial was denied him. The district court also found that the proceedings violated the right under the Sixth Amendment to be informed of the nature and cause of the accusation. In view of the fact that this independent ground for dismissing the indictment is unchallenged by this appeal, is there a case or controversy required by Article 3, Section 2 of the Constitution to give this Court jurisdiction?

2. In its first proceeding against the defendant, the Government limited its prosecution to a one-count indictment charging a violation of 26 U.S.C. 4705(a). After the judgment on that indictment was set aside, the Government caused Ewell to be reindicted on the original and two additional counts stemming from the same alleged sale of narcotics. These new counts charged violations of 26 U.S.C. 4704(a) and 21 U.S.C. 174. The Government delayed informing the defendant of the charges over fifteen months.

This entire time the defendant was in the custody of the Government. Under these circumstances, was Ewell denied his right under the Sixth Amendment to reasonable notice of every element of the charges he must be prepared to defend?

3. The defendant was arrested and jailed on December 12, 1962, and charged with an illegal sale of narcotics which allegedly occurred on October 31, 1962. The defendant was not indicted for violating 26 U.S.C. 4704(a), which is the subject of this appeal, however, until March 26, 1964, even though he had been in the custody of the Government since the day of his arrest and could have been indicted on this charge at any time. The question is whether the Government's delay in charging the defendant with a violation of 26 U.S.C. 4704(a) resulted in a denial of his Sixth Amendment guarantee of a speedy trial on this charge.

4. In the original proceeding the Government caused the Grand Jury to indict the defendant for a sale of narcotics in violation of 26 U.S.C. 4705(a). Fifteen months later the Government caused the defendant to be indicted on two additional counts charging violations of 26 U.S.C. 4704 (a) and 21 U.S.C. 174. These new counts admittedly grew out of the same sale alleged in the first indictment. The question is whether this successive prosecution of the defendant for the same act is barred by the double jeopardy clause of the Fifth Amendment.

Statement

On December 10, 1962, a complaint was filed charging the appellee, Clarence Ewell, with a violation of Title 26 U.S.C. 4705(a), which makes it a felony to sell narcotics to one

who does not possess a written order form issued by the Secretary of the Treasury.[1] The appellee was arrested on December 12, 1962, and was remanded to jail after a commissioner's hearing when he was unable to post bond (R. 14-15).

A single sale of narcotics (heroin) may constitute a violation of three statutes. Proof of a single sale will support a prima facie case for violations of 21 U.S.C. 174 (concerning illegally imported narcotics), and 26 U.S.C. 4704(a) (selling not in nor from the original stamped package), as well as 26 U.S.C. 4705(a). See *Gore* v. *United States,* 357 U.S. 387. The Government chose not to proceed under the first two sections and on December 14, 1962, an indictment was returned charging the appellee with violating 26 U.S.C. 4705(a) alone. The indictment did not set forth the name of the alleged purchaser. Ewell pleaded guilty on December 18, 1962, and was sentenced as a second offender[2] to the minimum sentence of 10 years, pursuant to 26 U.S.C. 7237(b), (c)(1) and (d) (R. 15-18).

On January 17, 1963, the Court of Appeals for the Seventh Circuit, in an unrelated case emanating from the same district court as this case, held that an indictment

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[1] The factual situations of Clarence Ewell and Ronald K. Dennis are practically identical. The only material differences are the dates of occurrences. Ewell preceded Dennis at every stage of the proceedings. For the sake of simplicity, this Brief is written on the basis of the facts concerning Clarence Ewell only; and, where there is a difference other than one of time, it will be indicated by footnote. No counsel has been appointed for Ronald K. Dennis in this appeal. It is the understanding of this counsel that Ronald K. Dennis could not be located in order to sign a petition for appointment of counsel. As used in this Brief, "appellee" and "defendant" refers to Clarence Ewell unless otherwise indicated.

[2] Dennis was not a second offender and was sentenced to the minimum term of five years after a commitment for study under 18 U.S.C. 4208(b) (R. 46-50).

under 26 U.S.C. 4705(a), which does not allege the name of the purchaser is defective because it violates the Sixth Amendment requirement that the accused be informed of the nature and cause of the accusation, and that such an indictment would not permit the defendant to plead his conviction as a bar to further prosecution for the same offense. *Lauer* v. *United States,* 320 F. 2d 187 (C.A. 7). In spite of the fact that the Government's Brief (p. 9, n. 5) states the *Lauer* decision was contrary to a prior decision of this Court, *United States* v. *Debrow,* 346 U.S. 374, and one of the Ninth Circuit, *Rivera* v. *United States,* 318 F. 2d 606, 607 (C.A. 9), and was deemed to be incorrect (Brief, p. 15), the Solicitor General permitted the decision to stand unchallenged.

On November 6, 1963, Ewell moved to vacate his conviction pursuant to 28 U.S.C. 2255 on the basis of the *Lauer* decision. The motion was granted on January 13, 1964. By the time the appellee's section 2255 motion was granted, according to the Government's Jurisdictional Statement (p. 3, n. 3) and Brief (p. 9, n. 5), two additional circuits that had had occasion to consider the ruling in *Lauer* had rejected it. *Clay* v. *United States,* 326 F. 2d 196 (C.A. 10) (December 24, 1963); *Jackson* v. *United States,* 325 F. 2d 477 (C.A. 8) (December 20, 1963). In spite of this, the Government did not appeal the decision setting aside the appellee's conviction. On the contrary, appellee was arrested upon his release on a new complaint based on the same sale which had formed the basis of the original conviction. This time the complaint charged a violation of 26 U.S.C. 4704(a) as well as 4705(a). After a probable cause hearing before the United States Commissioner, the appellee was remanded to jail for failure to post bond (R. 18-21).

On March 26, 1964, the Grand Jury returned an indictment against Ewell based on the transaction involved in the original indictment. However, this time three separate crimes were charged. Count I charged a sale without an order form in violation of 26 U.S.C. 4705(a); Count II charged a sale not in nor from the original stamped package, in violation of 26 U.S.C. 4704(a); and Count III charged dealing in illegally imported narcotics in violation of 21 U.S.C. 174 (R. 20-22). The defendant now faced a maximum penalty of 100 years and $60,000 fine, or both; whereas, under the original indictment the maximum sentence faced by Ewell was 40 years and a fine of $20,000 or both. These charges faced for the first time came more than seventeen months after the offense.

Ewell pleaded not guilty on arraignment. A motion to dismiss the indictment was filed on the grounds it violated the provisions of the Fifth and Sixth Amendments (R. 22-23). On July 13, 1964, the district court denied the motion on the Fifth Amendment ground of double jeopardy, but dismissed the indictment on two Sixth Amendment grounds. The court stated that Ewell's Sixth Amendment right to a speedy trial and the right to be informed of the nature and cause of the accusation had been violated by the combined events stated above (R. 25-26).[3]

The opinion of the court noted that while Ewell had served almost nineteen months of his sentence, because of the *Lauer* decision Ewell had no choice but to attack his judgment and sentence immediately. The court also found that the Government:

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[3] The Government, both in its Jurisdictional Statement and its Brief, completely ignores that part of the opinion holding that the inclusion of the two additional counts in the second indictment violated this Sixth Amendment right of an accused to be informed of the nature and cause of the accusation.

> ". . . for some reason unknown of record other than the expressed concern of the prospective liberation of a number of similarly convicted narcotic felons, caused the Grand Jury in March, 1964, to reindict Mr. Ewell for three narcotic offenses allegedly occurring on the same date growing out of the same transaction whereas the first indictment was for one narcotic offense allegedly occurring on the same date and apparently the same transaction referred to in the three offenses in the three-count indictment" (R. 25).

The court observed that Ewell was not a belligerent offender and also expressed the view that none of the time he had already served and would serve until his trial could be credited to any sentence he might receive if found guilty because of Title 26 U.S.C. 7237(b), (c)(1), and (d), and Title 18 U.S.C. 3568 (R. 25).

The Government petitioned for rehearing on July 22, 1964 (R. 26-28), and for the first time stated that "in recognition of the inequity to this defendant arising from the fact that under the mandatory sentencing provisions of 26 U.S.C. 4705(a) and 21 U.S.C. 174, the Court may not give credit for the time already served" (R. 35) the Attorney General had authorized the Government to offer to dismiss Counts I and III of the indictment if the court would reverse its decision and Ewell would plead guilty to Count II or would be found guilty on Count II, which might result in a minimum sentence of five years without probation or parole. After oral argument, the district court denied the Petition for Rehearing on July 30, 1964[4] (R. 39).

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[4] The Government did not offer to dismiss Counts I and III under any circumstances in the Dennis case.

Although the district court dismissed the indictment consisting of three counts, the Government, in its Jurisdictional Statement, has limited the appeal to "that portion of the order of the district court in each case which dismissed the second count of each indictment, charging a violation of 26 U.S.C. 4704(a)" (Jur. St., p. 5). The appeal was also limited to that part of the district court's judgment which was based on the Sixth Amendment right to a speedy trial. That part of the decision which was based on the right to be informed of the nature and cause of the accusation is not brought before the Court (Brief, pp. 1-2; Jur. St., p. 2). The reason given for limiting the appeal to Count II was so that there would be no question as to the right of the district court, in fixing sentence, to take into consideration the time already served by the appellee (Jurisdictional Statement, pp. 5-6, Brief, p. 5).

On May 11, 1965, six days before this Court noted probable jurisdiction in this case, the Seventh Circuit sitting En Banc overruled *Lauer* holding that the omission of the name of a purchaser from an indictment charging a violation of Title 26 U.S.C. 4705(a) was not a defect of such a fundamental nature as to render a judgment of conviction vulnerable to collateral attack. *Collins* v. *Markley,* 346 F. 2d 230 (C.A. 7).

Summary of Argument

I. The district court dismissed Count II of a second indictment against Clarence Ewell charging a violation of 26 U.S.C. 4704(a) on the grounds that under all of the circumstances the rights guaranteed him by the Sixth Amendment (a) to a speedy trial, and (b) to be informed of the nature and cause of the accusation, had been violated. The Government has limited its appeal to the ques-

tion of the denial of the right to a speedy trial, and the second ground for the trial court's decision is not mentioned in the Government's Jurisdictional Statement or Brief.

This Court is precluded from considering any questions except those raised by the Jurisdictional Statement or fairly comprised therein. Rule 15(1)(c)(1), *Revised Rules of the Supreme Court of the United States.* By not appealing the district court's decision concerning the right to be informed, the Government has left unchallenged an independent basis on which the trial court's dismissal of the indictment must be sustained. The question raised by the Government is moot because any decision of this Court concerning the defendant's right to a speedy trial would not affect his freedom and would be nothing more than an advisory opinion. This appeal does not, therefore, present a case or controversy as required by Article 3, Section 2 of the Constitution and should be dismissed.

II. The trial court's decision that the combined events of the proceedings against the defendant violated his right to be informed of the nature and cause of the accusation is clearly correct.

The Sixth Amendment entitles the accused to reasonable notice of every element of the charges which he will be required to defend. While delay in bringing charges obviously prejudices the defendant in the defense of such charges, the cases recognize that any delay is most severe in a narcotics case. In Ewell's case the Government originally charged him only with selling narcotics to one who did not possess the proper order form in violation of 26 U.S.C. 4705(a). When Ewell successfully set aside that conviction, the Government reindicted him and added two additional counts to the second indictment, one of which

was Count II, the subject matter of this appeal, charging Ewell with selling narcotics not from nor in the original stamped package in violation of 26 U.S.C. 4704(a). The delay in informing Ewell that he must defend this new charge was fifteen months, even though the new charge grew out of the same alleged transaction that was the basis of the first indictment. This delay severely prejudiced him in his ability to defend the new charge. The reason is obvious. Under the charge in the first indictment, the presence or absence of a stamped package was irrelevant. Under the new charge, however, the defendant would have to prove the existence of a stamped package in order to rebut the presumption that the sale of unstamped narcotics was made from an unstamped package. The defendant was in prison, unaware of this proposed charge and, therefore, unable to adequately prepare a defense when and if the Government informed him of the new charge.

This prejudice resulting from the delay is undenied. Because there has been prejudice, whatever reason there may have been for the delay is irrelevant. This case presents a perfect example of the reason for the Sixth Amendment right to be informed of the nature and cause of the accusation.

III. The dismissal of Count II on the grounds that the combined events violated the defendant's right to a speedy trial is clearly correct.

The delay involved was substantial under the circumstances. The defendant was arrested on December 12, 1962, and was not indicted under the charge in question until March 26, 1964, in spite of the fact that he was in the custody of the Government this entire period. The defendant's right to a speedy trial is not affected by the fact that

he is in jail on another conviction. Furthermore, the period to be measured by the speedy trial protection is begun when the prosecution is first instituted and is not affected by the filing of a second indictment charging different violations arising from the same act. The Government's attempt to break the total period of delay into several lesser periods and hold these periods up to the speedy trial guarantee is completely unsupported by the law and the facts. The uncontroverted fact is that the defendant was incarcerated over fifteen months before he was first charged with a violation of 26 U.S.C. 4704(a).

The Government has not met its burden of showing that the defendant was not prejudiced by the delay, and the facts clearly show that he was prejudiced. The defendant was prejudiced by the restraint upon his liberty, by the harassment of successive prosecution based on the same act and by the accompanying notoriety and anxiety resulting therefrom. The defendant was most severely prejudiced, however, in his ability to defend the new charge because of the fifteen-month delay. The Government does not deny the existence of this prejudice.

While the defendant is not required to show that the delay and prejudice was the result of purposeful conduct, nevertheless this appeal would never have reached this Court and the delay and prejudice resulting to the defendant would not have occurred except for the conduct of the Government, whether or not it was purposeful.

As the district court found, it was the combined events of the proceedings by the Government which denied the defendant his right to a speedy trial.

IV. In the original proceeding, the Government caused the Grand Jury to indict the defendant on only one count

charging a sale of narcotics in violation of 26 U.S.C. 4705 (a). Fifteen months later, after the defendant successfully set aside that conviction, the Government indicted the defendant on the original count plus two additional counts charging violations of 26 U.S.C. 4704(a) and 21 U.S.C. 174. These new counts admittedly grew out of the same sale alleged in the first indictment. There is no question that had these two counts been included in the first indictment no constitutional right would have been violated. However, to permit prosecutions for these alleged violations to be brought at a later date for any reason gives the Government the power to subject the defendant to longer sentences for the same act. In this case the trial court held this tactic was used to discourage other similarly convicted defendants from attacking their convictions. Under the reasoning in *Abbate* v. *United States,* 359 U.S. 187, 196-199 (Separate Opinion), the addition of Count II to the second indictment is clearly barred by the double jeopardy clause of the Fifth Amendment.

ARGUMENT

I.

The Appeal Does Not Present a Case or Controversy and Should Be Dismissed.

The ultimate finding of the district court was (R. 25):

> "The rights of Mr. Ewell under the Sixth Amendment of the United States Constitution quoted in part as follows has been violated by the combined events recited herein:
>
> 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . *and to be*

informed of the nature and cause of the accusation . . .'" (Emphasis added.)

The holding obviously was not only that the defendant had been denied his right to a speedy trial, as stated by the Government (Jur. St., p. 2, and Brief, pp. 1-2), but also that Ewell had not been informed of the nature and cause of the accusation as well. In other words, the court found that the proceedings violated *two* independent rights guaranteed by the Sixth Amendment. The question raised by the Government's appeal is the following:

> "The question presented is whether the District Court erred in dismissing the subsequent indictments on the ground that, because of the time each appellee had already served on the sentence set aside under 28 U.S.C. 2255, retrial on new indictments was barred by the Sixth Amendment guarantee of a right to a speedy trial" (Jur. St., p. 2).

and in the Brief:

> ". . . the question is whether, under these circumstances, the Sixth Amendment's guaranty of a speedy trial requires dismissal of the new indictments" (Brief, p. 2).

No mention is made in the Government's Jurisdictional Statement or Brief of the right of the accused to be informed of the nature and cause of the accusation.

Rule 15(1)(c)(1) of this Court precludes consideration of any question except those set forth in the Jurisdictional Statement or fairly comprised therein. The district court's opinion found the denial of two independent constitutional guarantees, and the question concerning the right to be informed of the nature and cause of the accusation cannot be fairly comprised in the speedy trial question as it is phrased

in the Jurisdictional Statement. The fact that the Government's Brief makes absolutely no mention of this second ground confirms that there was no intent to appeal this aspect of the judgment. Thus, the finding of the trial court that the appellee was denied his right to be informed remains unchallenged.

Therefore, whether this defendant was also denied his right to a speedy trial is a moot question. Any decision by this Court concerning the right to a speedy trial would not affect the defendant's freedom and would be purely an advisory opinion. This appeal does not present a case or controversy as required by Article 3, Section 2, of the Constitution and should be dismissed.

II.

The District Court's Decision That the Proceedings Against the Defendant Violated the Sixth Amendment Right to Be Informed of the Nature and Cause of the Accusation Is Correct.

Even if the Government had properly presented the question to this Court as to its correctness, the holding of the district court that the addition of Count II to the second indictment violated the Sixth Amendment right to be informed of the nature and cause of the accusation is correct, both on the basis of the facts disclosed by the record and as a matter of law.

The district court held this right was "violated by the combined events" (R. 25), of the entire proceeding against Ewell. To overturn this finding, it is necessary for the appellant to show that the combined events set forth by the district court did not result in prejudice to the defendant and did not violate his right to be informed. It is submitted that the Government cannot meet this burden.

The Sixth Amendment clause in question entitles the accused to be advised of every element of the charges against him to which it will be necessary for him to prepare a defense. *United States* v. *Debrow,* 346 U.S. 374, 377, 378; *United States* v. *Cruikshank,* 92 U.S. (2 Otto) 542, 558; *United States* v. *Seeger,* 303 F. 2d 478, 482 (C.A. 2); *Hallman* v. *United States,* 208 F. 2d 825, 827 (C.A.D.C.). This Court has recently reiterated that this Sixth Amendment right to reasonable notice of a charge against a defendant is basic in our system of jurisprudence. *Pointer* v. *Texas,* —— U.S. ——, 13 L.Ed. 2d 923, 927, and it has been well recognized by the courts that any delay in charging and trying a defendant prejudices him in his ability to defend himself. *Petition of Provoo,* 17 F.R.D. 183, 198 (D. Md.), affirmed 350 U.S. 857; *Taylor* v. *United States,* 238 F. 2d 259 (C.A.D.C.); *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.). In narcotics cases, any delay is extremely prejudicial to the defense of the charges for three reasons. These are (1) the nature of the statutes involved, which do not create an offense for selling narcotics forbidden *per se,* but merely penalize a sale which violates their technical requirements, *Blockburger* v. *United States,* 284 U.S. 299, 302; (2) the technique used by the Government in enforcing these statutes;[5] and (3) the presumption of guilt contained in the statutes.[6]

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[5] In *Nickens* v. *United States,* 323 F. 2d 808, 813-14 (C.A.D.C.), Judge Wright stated the following in a concurring opinion:

"Narcotics addiction poses a serious problem for society, but the solutions at times attempted to raise other dangers. As Mr. Justice Roberts observed, 'The efforts . . . to obtain arrests and convictions have too often been marked by reprehensible methods,' methods which he termed a 'prostitution of the criminal law.' Since addicts ordinarily become known

An examination of the proceedings found by the district court to violate the Sixth Amendment requirement to inform the accused of the nature and cause of the accusation, reveals how all these factors have worked to prejudice the defendant severely.

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to the police in the course of repeated offenses, the addict on the street lives always in fear of arrest at the discretion of the police. Since the addict is continually in possession of narcotics, proof of a new offense is easily come by. As here, it is the practice for the police themselves to arrange for a sale to be made. The arrangements are often made through some informant, an addict himself, who is working his peace with the police by entrapping fellow addicts. In this way narcotic arrests, as distinguished from arrests for other offenses are shaped by the police, at a time of their choice, against a suspect of their choice, before witnesses of their choice. Thus, the Government has almost total control of the evidentiary situation.

"Total control of the evidentiary situation by the Government, of course, makes for an airtight case. But when delay in prosecution intervenes, this airtight trap may blindly close on the wrong man. Error becomes more possible with each passing day, and a person caught by mistake in this airtight trap may indeed be helpless. The danger of grave injustice is magnified in a case such as this where the identification is predicated on a single sale, and where, as is customary, the Government uses an addict as its informant. Since the possibility of abuse of the Government's control over the evidence exists, the court must remain vigilant to scrutinize delay, for '(t)he preservation of the purity of its own temple belongs only to the court.' "

See also *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.).

*26 U.S.C. 4704(a) states: "The absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this sub-section by the person in whose possession the same may be found." 21 U.S.C. 174 states: ". . . Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

As previously noted, the Government initially could have caused the Grand Jury to indict Ewell for violations of 26 U.S.C. 4704(a) (selling narcotics neither from nor in the original tax-stamped package), and 21 U.S.C. 174 (dealing in unlawfully imported narcotics), along with the crime actually charged. *Blockburger* v. *United States,* 284 U.S. 299; *Gore* v. *United States,* 357 U.S. 387; *Harris* v. *United States,* 359 U.S. 19. For some unknown reason the Government did not.[7] When Ewell successfully set aside the original conviction, the Government caused him to be arrested on a new complaint filed even before he was released from prison (R. 20). This new complaint which came some fifteen months after the date of the alleged crime was the first notice the defendant had that he might have to defend himself of a charge under 26 U.S.C. 4704(a), and after the Government had indicated affirmatively by its course of conduct that he would not be required to do so. The indictment was returned on March 26, 1964, over fifteen months after the date of the original arrest (R. 21).

The mere proof of a sale of narcotics not in a stamped package will support a conviction if unrebutted. *Harris* v. *United States,* 359 U.S. 19, 23; *Beland* v. *United States,* 100 F. 2d 289, 291 (C.A. 5), certiorari denied 306 U.S. 636.

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[7] Two possible explanations for the Government's failure to do so are (1) the insufficiency of evidence on the other counts, and (2) that the penalty prescribed for a violation of only one statute was adequate punishment for the particular defendant. This latter theory finds support in Judge Bazelon's discussion on the relation of the Government's choice as to the number and nature of counts it prosecutes a defendant on, and the role played by the particular defendant in the narcotic traffic. *Hutchinson* v. *United States,* 345 F. 2d 964, 972-977 (C.A.D.C.). The prejudice resulting from the subsequent inclusion of these counts in the second indictment if either of these reasons motivated the Government's decision is obvious.

On the other hand, since 26 U.S.C. 4705(a) is only violated by selling narcotics to someone who does not possess the proper order form, the fact that a defendant may have sold the narcotics in or from a stamped package is irrelevant to the defense of this particular charge.

It is easy to imagine how any delay could result in serious prejudice to a defendant in a situation similar to Clarence Ewell's. Thus, one in legal possession of a stamped package might sell narcotics from this package to a person who may or may not possess the proper order form. This seller is subsequently charged, arrested and indicted for selling narcotics to a person who did not have the proper form in violation of 26 U.S.C. 4705(a). It is only reasonable for this defendant to assume that since this is the charge the Government has caused the Grand Jury to indict him on, in view of the Constitutional requirement to be informed of every element of the case against him, this is the only charge he must be prepared to defend. Thinking the stamped package irrelevant to his defense, it is not preserved.

For some reason he is later charged with selling narcotics not from nor in the stamped package in violation of 26 U.S.C. 4704(a). It may then be extremely difficult to rebut the presumption that the narcotics were not sold from a stamped package. The Government could make its case merely by proving a sale of unstamped drugs with the testimony of the purchaser, *Beland* v. *United States,* 100 F. 2d 289, 291 (C.A. 5), certiorari denied 306 U.S. 636, but if the purchaser did not know where the narcotics the defendant sold him came from, or could not remember whether or not the defendant had a stamped package, it would be virtually impossible for the defendant to rebut the statutory presumption. The prejudice to the defense of the

charges under 26 U.S.C. 4704(a) in this circumstance would be grave indeed.

The degree of prejudice varies with the particular circumstances and depends, among other things, on the length of the delay and the strength of the Government's evidence against the defendant. *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.); *Nickens* v. *United States,* 323 F. 2d 808 (C.A. D.C.); *Taylor* v. *United States,* 238 F. 2d 259 (C.A.D.C.). In the present example, for instance, if the defendant was arrested in the act of selling the drugs and was searched on the spot, the prejudice resulting from the failure to inform him of prosecution under the "stamped package" statute would be lessened. On the other hand, if the arrest was made at a date subsequent to the sale in question, the prejudice would be greater.

In the case of Clarence Ewell, the arrest was made some six weeks after the alleged violation and he was not charged with violating 26 U.S.C. 4704(a) until some fifteen months later. During this interval, there was no mention of any violation of 26 U.S.C. 4704(a) and Ewell was in jail unable to prepare a defense to any new charges the Government might bring.

Because the record before this Court does not contain evidence against Ewell, it is important to reiterate that the district court, on the basis of the entire record of all of the proceedings involved, including the Government's evidence presented at the disposition proceeding (R. 16), found that the combination of all of the circumstances violated the defendant's Sixth Amendment right to be informed of the nature and cause of the accusation (R. 24-25). The relevant question before the district court was not whether there was actual prejudice to the defendant, but whether

there was a reasonable *possibility* of prejudice. *Fahy* v. *Connecticut,* 375 U.S. 85, 86-87; *Glasser* v. *United States,* 315 U.S. 60, 75-76; *United States* v. *Wilkins,* 348 F. 2d 844, 864 (C.A. 2). Implicit in the judgment of the district court is the finding of at least the possibility of prejudice in defending the new charge under 26 U.S.C. 4704(a).

In *Hallman* v. *United States,* 208 F. 2d 825 (C.A.D.C.), the facts were similar to the instant case. The defendant was indicted on a five-count indictment, three of which charged violations of the same three statutes contained in this defendant's second indictment.[8] The first count charged a sale "to James Fair" not in pursuance of a written order, and the second and third counts charged a "stamped package" violation and "a dealing in illegally imported narcotics" violation and no purchaser was named in either of these counts. At the beginning of the trial, it was apparent that the Government was not going to prove that the sale was to James Fair but to another employee of the Bureau of Narcotics. The trial court then dismissed Count I, but refused to dismiss the second and third counts on the ground that under these counts it was immaterial who the purchaser was. The Court of Appeals reversed the district court and stated the following at page 827:

> "The Constitution requires that the accused be informed 'of the nature and cause of the accusation' (Amendment VI), and the cases interpret that to mean that he must be so definitely informed as to be enabled to present his defense. The test, say the courts, is whether the accused was misled. Counsel in the case at bar said and says she was misled. That position is well founded, we think, in view of the specific designation

[8] 26 U.S.C. 4705(a); 26 U.S.C. 4704(a); 21 U.S.C. 174.

of James Fair in the first count and the statement in the other counts that the capsules were the same in all counts. That latter statement was misleading under the circumstances of the case."[9]

While the harm in *Hallman* was the result of a mistake, it cannot be argued here that the prejudice to the defendant Ewell was the result of a mistake, for the decision not to include a count charging a violation of the "stamped package" provision in the first indictment must be presumed to have been an informed decision on the part of the Government, and the finding of the district court that the two new counts were added to the second indictment because of the "expressed concern of the prospective liberation of a number of similarly convicted narcotic felons" (R. 25) is unrebutted.

Furthermore, it is no argument that the Government only included this count in the second indictment after the defendant was successful in setting aside the first (Government Brief, pp. 9-13). The relevant fact is the Government could have included this count in the first indictment. It chose not to. The Sixth Amendment right to be informed of the nature and cause of the accusation was abridged at that time and the prejudice to the defense grew with each passing day. Any reason the Government could offer for

[9] While the court in *Ross* v. *United States*, 349 F. 2d 210 (C.A.D.C.), found a denial of due process, it did so because it did not wish to limit the holding to the more specific language of the Sixth Amendment on the particular facts of the case. Nevertheless the court found that a 7-month period from the date of the alleged offense until the filing of a complaint was an unreasonable delay "in apprising appellant of the charge against him . . .," (p. 211), and the effect of that delay was to adversely affect the ability of the defendant to defend himself against the charge.

its delay in charging this defendant is irrelevant since the harm done by this failure is totally unrelated to any particular reasons for this delay. *Petition of Provoo,* 17 F.R.D. 183, 202 (D. Md.), affirmed 350 U.S. 857. To hold otherwise would make this requirement of the Sixth Amendment meaningless.

The defendant, therefore, maintains that the finding of the district court that the combined events violated the Sixth Amendment right to be informed of the nature and cause of the accusation is clearly supported by the facts and the law and could not have been overturned by the Government on the basis of the record before this Court even had the Government attempted to do so.

III.

The Appellee Was Deprived of His Right to a Speedy Trial Under the Sixth Amendment on the Charge of Selling Narcotics in Violation of Title 26 U.S.C. 4704(a).

The Government has appealed to this Court only that portion of the district court's judgment dismissing Count II of a three-count indictment. The reason given is that under the sentencing provisions which apply to Count I and Count III the defendant may not receive credit for the time previously spent in jail on the first indictment (Jur. St., pp. 4-6, Brief, p. 5). The Government has left unchallenged the holding that the defendant was denied his right to a speedy trial on Count I and Count III of the indictment. It, therefore, appears that serious questions concerning the "law of the case" exist in considering the appeal of Count II. However, in recognition of the fact that this is merely a discretionary rule of practice as far

as this Court is concerned, *United States* v. *United States Smelting, R & M Co.*, 339 U.S. 186, 199, the defendant will not take the Court's time with an extended brief and argument of this principle. However, this Court can dispose of this appeal on the ground that there is no material difference between Count II and the other two counts, and the district court's decision is, therefore, controlling on the question of whether the defendant was denied his right to a speedy trial on Count II.

There can be no question, however, that the district court was correct in finding that the combined events of the proceedings concerning the charge in Count II of the second indictment violated the Sixth Amendment guarantee of the right to a speedy trial.

A. *The Delay Involved Was Substantial.*

The issue raised by the Government's limited appeal is whether under the circumstances there has been a delay in charging, indicting and bringing the defendant to trial on a charge of violating 26 U.S.C. 4704(a). The defendant maintains that there has been a substantial delay. The Government's arguments (Brief for the United States, pp. 7-13) concerning delay fail to give recognition to the fact that the period in question is measured from the date of the alleged violation in October of 1962, and the defendant's arrest and incarceration in December of that year, until the date the indictment was returned on March 26, 1964. The Government also attempts to break down the period of delay into lesser periods and hold these shorter periods up to the touchstone of the speedy trial guarantee. The defendant contends that this is obviously an improper approach.

1. The period of time from the commission of the alleged crime, October 31, 1962, until the defendant was formally charged with a violation of 26 U.S.C. 4704(a) on January 13, 1964 was almost fifteen months. The Government argues that for Constitutional purposes under the Sixth Amendment this period has been traditionally governed by the statute of limitations (Brief for the United States, p. 7). That is simply not the law. The cases cited by the Government (Brief, pp. 7-9) do not hold that the right to a speedy trial is never violated so long as the defendant is charged within the period of the statute of limitations. The Government would vest the sole authority to interpret what constitutes a speedy trial in Congress. A 75-year limitation period would presumably require a court to consider only the date of the crime and the date of the complaint and disregard the facts of a particular situation. This argument overlooks the fact that the judiciary alone has the power to interpret the Constitution.

Congress may reduce the period in which a defendant may be tried to less than the Constitution requires—it cannot extend that period, and in determining the Constitutional issue, each case must be decided on its own facts. It has recently been held that a delay of even seven months between the alleged commission of a crime and the formal complaint where a narcotics violation is involved violated the due process clause of the Fifth Amendment. *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.).[10] Other cases, on

[10] This Court of Appeals found that, on the basis of the record of the hearing on prejudice in the district court, the defendant made a plausible claim of prejudice in view of the weak case of the Government. In support of the decision, the court cited all speedy trial cases and specifically rejected the argument that the period in question was controlled by the statute of limitations. *Powell* v. *United States,* 8/30/65 (C.A.D.C.), decided after *Ross*

other facts, have upheld or reversed convictions dealing with other periods for other crimes; in each case, however, the issue was resolved on the basis of the facts there presented, and not by reference to an inflexible standard.

The important fact is that Clarence Ewell was in Government custody, in jail or prison for over fifteen months until he was first charged with a violation of 26 U.S.C. 4704(a). There can be no showing that this delay was "necessitated by the requirements of effective law-enforcement" as the Government argued unsuccessfully in *Ross, supra,* at p. 213. The delay in charging the defendant was substantial under the circumstances and the defendant was prejudiced by it.

2. The Court has recently stated that the period from arrest until the return of the indictment is covered by the protection of the Sixth Amendment. *Smith* v. *United States,* 360 U.S. 1, 10. The period in this case was over fifteen months (R. 15-21). All of this time the defendant was in custody. The Government argues that the time from the original arrest until the first indictment is a short one (two days), and the time from the arrest on the charges contained in the second indictment, January 13, 1964, until the indictment was brought on March 26, 1964 is not substantial, and concludes that there was, therefore, no substan-

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found no denial of due process in examining a delay of five months. The majority recognized in this case, however, that the statute of limitations governed this period only "to some extent." *Jackson* v. *United States,* 9/13/65 (C.A.D.C.), followed *Powell* for the reason that the defendant failed to make any attempt to show how he was prejudiced by a five-month delay. The test did not require a preponderance of the evidence, but merely "some showing." None of these cases treated the statute of limitations as affecting the right to a speedy trial.

tial delay (Brief for the United States, pp. 7-13). There is no support in logic or law for this argument. The period of time relevant for speedy trial purposes where the defense of a charge is prejudiced by the passage of time begins when the prosecution is first instituted and is not affected by the filing of a new indictment charging different violations arising from the same act. *Hanrahan* v. *United States,* 348 F. 2d 363, 367 (C.A.D.C.). The relevant period in this case, therefore, begins with the defendant's arrest on December 12, 1962 (R. 15).

The Government cites *United States* v. *Ball,* 163 U.S. 622, 672 and *United States* v. *Tateo,* 377 U.S. 463, 465 in support of the proposition that the period of time from the date of the original conviction until the defendant successfully sets aside the judgment and conviction on collateral attack cannot be considered. These cases are Fifth Amendment cases and are not concerned with the prejudice in defending new charges resulting from delay. The reliance on *Ball* and *Tateo* illustrates the Government's misconception of the facts. These cases are distinguishable because the defendants in both situations were faced with defending *only those charges which were lodged against them by the original indictment. Bayless* v. *United States,* 147 F. 2d 169 (C.A. 8), reversed on other grounds 150 F. 2d 236 and *United States* v. *Brest,* 266 F. 2d 879, 880 (C.A. 3), cert. denied 362 U.S. 912 are distinguishable for the same reason.

The defendant has the right to a speedy trial even if he is in jail on another charge. *Ponzi* v. *Fessenden,* 258 U.S. 254, 264; *Taylor* v. *United States,* 238 F. 2d 259, 261 (C.A. D.C.); *Frankel* v. *Woodrough,* 7 F. 2d 796, 798 (C.A. 8). To exclude from the protection of the Sixth Amendment a delay which resulted from even bona fide error in the

original proceeding by holding it to be a justifiable burden for the accused to bear would be inconsistent with the policy of a speedy trial to protect the accused from harm. As the court in *Provoo* recognized, the degree of prejudice or detriment suffered by the accused is unrelated to any particular reason for delay. 17 F.R.D. 183, 202 (D. Md.), affirmed 350 U.S. 857. The delay in charging and indicting Clarence Ewell was substantial under the circumstances.

B. *The Appellee Has Been Prejudiced by the Delay.*

If any difference is found between Count II and Count III, it must go to the question of the prejudice to the defendant. This is so because the history of these two counts is identical (R. 20-26) and the only possible difference between the counts relative to the speedy trial issue is in their respective sentencing provisions. The Government's statement that this appeal is limited only to the dismissal of Count II so that there is no question as to crediting the time the defendant has already served to any new sentence (Jurisdictional Statement, pp. 5-6) indicates that the Government considers this prejudice which would exist under Count I and Count III to be the only material difference between those counts and Count II. Therefore, if the possibility of some prejudice can also be found to exist under Count II, it would seem that the Government must concede that there has been a denial of a speedy trial under Count II as well, in view of its failure to appeal the dismissal of Counts I and III.

The case law under the Sixth Amendment is unclear as to whether the Government had the burden of showing in the district court that the defendant was not prejudiced by a delay. Our reading of *Petition of Provoo,* 17 F.R.D. 183, 203 (D. Md.), affirmed 350 U.S. 857; *Taylor* v. *United States,*

238 F. 2d 259 (C.A.D.C.); *United States* v. *Lustman,* 258 F. 2d 475, 478 (C.A. 2), cert. den. 358 U.S. 880 and *Williams* v. *United States,* 250 F. 2d 19, 21 (C.A.D.C.) indicates that the Government bears this burden. In any event the Government made no such showing, and it is clear that the trial court found as a matter of fact that the prejudice to the defendant denied him his right to a speedy trial. In view of this factual finding, the burden in this Court is certainly on the Government to demonstrate clearly that the defendant in fact was not prejudiced.[11] The record fully supports the decision of the district court that there was such prejudice.

1. First, the appellee was prejudiced simply by the imprisonment of some nineteen months while awaiting trial on Count II. The restraint on liberty alone has been held to constitute prejudice. *Petition of Provoo,* 17 F.R.D. 183, 203 (D. Md.), affirmed 350 U.S. 857; *Frankel* v. *Woodrough,* 7 F. 2d 796 (C.A. 8). The district court found that the fact that the some nineteen months already spent in jail could not be credited to the minimum sentence he originally gave the defendant was particularly prejudicial and obviously so did the Government.[12]

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[11] On the basis of the record brought before this Court, the defendant maintains there can be no such showing. For this reason alone, the decision of the district court should be affirmed, or in the alternative, the Court should remand the appeal to the district court for further hearings on the matter of prejudice as was done in *Ward* v. *United States,* 346 F. 2d 423 (C.A.D.C.); *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.).

[12] The Government in its Petition for Rehearing stated the following (R. 35):

"In recognition of the inequity to this defendant arising from the fact that under the mandatory sentencing provisions of

Under Count II, this latter prejudice admittedly would not carry as severe a penalty since the minimum mandatory sentence for a second offender is five years. However, Ewell cannot actually receive any credit on this five-year sentence and has lost the "good time" he received under the invalid sentence.[13]

All consideration of these sentencing provisions aside, it is submitted that this lengthy restraint on Ewell's freedom is prejudice enough to sustain the district court's opinion.

2. The defendant is prejudiced by the harassment of a second criminal proceeding against him and the accompanying notoriety and anxiety resulting therefrom. *Downum* v. *United States,* 372 U.S. 734, 736; *Hurtado* v. *California,* 110 U.S. 516, 522; *Petition of Provoo,* 17 F.R.D. 183, 198 (D. Md.), affirmed 350 U.S. 857. Ewell ran the gauntlet once and thought that he was paying his debt to society pursuant to a valid judgment and sentence. As a result of the *Lauer* decision, he felt compelled to move to set aside the judgment only to find himself forced to defend a prosecution on two additional charges. The harassment result-

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26 U.S.C. 4705(a) and 21 U.S.C. 174, the Court may not give credit for time already served . . ."

This was repeated in the Jurisdictional Statement, pp. 5-6, as the reason only the dismissal of Count II is questioned by this appeal.

[13] It can also be argued that since the maximum sentence under Count II is twenty years, Ewell is prejudiced because he *might* not receive any credit on any new sentence for the district court is not presently required to give credit under existing law and there is nothing to prohibit him from giving Ewell the maximum.

ing from these trials seriatim for offenses arising from the same act standing alone is prejudice enough.[14]

3. The most severe prejudice resulting from the proceedings against the defendant has been the prejudice in the defense of the charges against him under Title 26 U.S.C. 4704(a) contained in Count II. The prejudice resulting from this delay has been treated in detail at pages 14 through 20 *supra,* and will not be re-examined here. It not only violates the independent constitutional right contained in the Sixth Amendment to be informed of the nature and cause of the accusation as found by the district court (R. 25-26) but is also severe enough to sustain a finding of a denial of a speedy trial. The Government has not denied its existence.[15]

On the basis of the Record and the Brief of the United States, the finding of prejudice implicit in the decision below remains not only unimpeached but is clearly supported.

C. *The Delay and the Resulting Prejudice Was a Result of the Government's Conduct.*

The defendant maintains that there has been a substantial delay and that the delay has severely prejudiced the defendant. Under the Sixth Amendment it is only neces-

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[14] It has been stated by this Court that successive prosecutions such as this are prohibited by the double jeopardy clause of the Fifth Amendment. *Abbate* v. *United States,* 359 U. S. 187, 196-201 (Separate Opinion); *Petite* v. *United States,* 361 U.S. 529, 533 (Separate Opinion).

[15] Instead, the Government has confined its argument to the prejudice resulting under Counts I and III (Brief, pp. 19-22); the dismissal of said counts it has not chosen to appeal.

sary to show that a delay is purposeful or oppressive or results in prejudice to the defendant. *Petition of Provoo,* 17 F.R.D. 183, 203 (D. Md.), affirmed 350 U.S. 357; Government's Jurisdictional Statement, p. 7.[16] While the district court judgment is clearly supported without subsidiary evidentiary findings as to the cause of the delay, the situation which the district court found to violate the defendant's Sixth Amendment rights was a direct result of the conduct of the Government in making four separate decisions at various stages in the proceedings.

1. The Government did not indict the defendant for violations of 26 U.S.C. 4704(a) and 21 U.S.C. 174 at the original Grand Jury proceeding in December, 1962. While it had the option to do so for some reason unknown of record it chose not to in this case.[17] Because the other two counts were omitted, the defendant was justifiably led to believe that the count under 26 U.S.C. 4705(a) would be the extent of the Government's prosecution against him. The defendant was at no point advised that other charges might be later filed. The Government does not contend that the other charges were brought as the result of any new evidence. This was the first of four decisions by the Government which led to the prejudice of the defendant.

2. The Government did not appeal the decision of the Seventh Circuit Court of Appeals in *Lauer* v. *United States,* 320 F. 2d 187 (C.A. 7). According to the Government,

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[16] The Government's subsequent statement in its Brief, pp. 13-14, that a delay between arrest and indictment will amount to a denial of a speedy trial only if it is purposeful or oppressive *and* results in prejudice to the defendant is not supported by the cases.

[17] See note 7, p. 17 *supra.*

Lauer was contrary to a prior decision of this Court, *United States* v. *Debrow*, 346 U.S. 374, and one of the Ninth Circuit, *Rivera* v. *United States*, 318 F. 2d 606 (Brief, p. 9, n. 5) and was believed to be incorrect (Brief, p. 15). It was also a decision of far-reaching effect, particularly in the Seventh Circuit. Yet the Government chose not to appeal.[18]

The decision to allow what the Government felt to be a bad precedent, contrary to law, to remain unchallenged as the law in the Seventh Circuit with the belief that it had far-reaching consequences was the second decision of the Government which led to the defendant's ultimate prejudice, for as the district court found (R. 24-25), in light of *Lauer* the defendant had no choice but to attempt to set aside his conviction immediately.

3. Congress saw fit to implement the "great writ" of habeas corpus by passing Title 28 U.S.C. 2255, which gives a defendant a right to petition the sentencing court to set aside his judgment and conviction. After *Lauer* held in effect that a conviction on an indictment identical to Clarence Ewell's could be set aside pursuant to this section on the ground that it failed to charge an offense and could not be pleaded in bar to a subsequent prosecution

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[18] The Government states that it did not petition for certiorari because few cases were expected to be affected by *Lauer*. (Brief, p. 15, n. 12.) However, in the same petition for re-hearing cited by the Government in this note, the following argument was made to the Seventh Circuit:

> "We would like to point out to the court that if the instant opinion remains the law, such opinion might well lead to numerous collateral attacks by narcotic violators since it is not uncommon to omit the name of the narcotics purchaser from the indictment."

(Page 9 of printed petition for re-hearing filed July 17, 1963. See 320 F. 2d at 191.)

for the same offense, Ewell thereafter proceeded to file a similar motion.[19] It is suggested that Ewell and his counsel could have ignored the *Lauer* case and could have elected to serve the remaining 8½ years of the sentence and let the conviction remain unchallenged (Brief, pp. 16-17). Such a contention is patently unreasonable. It would require the defendant and his counsel to disregard the fact that he had no way of showing who the purchaser of the drug was if the Government chose to reindict him a second time on a narcotics charge alleging the same city and date. This suggestion also overlooks the fact that this Court has recognized that a conviction has other effects which may extend beyond the term of the sentence imposed thereon. *United States* v. *Morgan,* 346 U.S. 502, 512-513; *Fiswick* v. *United States,* 329 U.S. 211, 220-223.[20] As the district court found (R. 25) the defendant really had no choice but to attack this invalid judgment immediately.

When the district court granted the defendant's section 2255 motion on January 13, 1964, the Government had the opportunity to appeal this decision to the Seventh Circuit. It did not.

As noted in the Government's Brief (p. 9, n. 5) and Jurisdictional Statement (p. 3, n. 3), by this time two cir-

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[19] The Government suggests that there would be no problem in pleading the conviction on the first indictment as a bar to further prosecution for the same offense because the burden would be on the Government to rebut a plea of double jeopardy. (Brief, pp. 16-17.) This argument is unsupported and conflicts with the Government's present position that the defendant has the burden of proving prejudice under the Sixth Amendment in this instant case.

[20] For instance, 26 U.S.C. 7237(a) provides for harsher penalties for third as well as second offenders for a violation of 26 U.S.C. 4704(a). This effect was specifically noted in *Morgan, supra.*

cuits had had the opportunity to consider the ruling in *Lauer* and had rejected it. *Clay* v. *United States,* 326 F. 2d 196 (C.A. 10); *Jackson* v. *United States,* 325 F. 2d 477 (C.A. 8). Furthermore, the Government argues that the defendant's situation was not clearly controlled by *Lauer* (Brief, pp. 16-17). Though the district court's decision in *Ewell* v. *Markley,* January 13, 1964 (R. 19-20) was the first decision dealing with a collateral attack which relied on *Lauer,* and was from the Government's point of view just as wrongly decided, the Government chose not to appeal it to the Seventh Circuit.[21] This decision closed the possibility that the original indictment might have been reinstated by the Court of Appeals or by this Court on further appeal, and caused the defendant to lose his "good time" credit and the fifteen months already served on his sentence on the first indictment. This was the third decision by the Government which resulted in the ultimate prejudice to the defendant.

4. The Government caused the defendant to be indicted on two new grounds in addition to the count contained in the original indictment (R. 21-22), including the one which is the subject of this appeal. By delaying until this time to first charge the defendant with these two new violations the Government's action has severely prejudiced the defendant in the defense of these new charges. (See this Brief, pp. 14-20 *supra.*) Furthermore, while Ewell had received a sentence of ten years and no fine on the original conviction, Ewell now faced the possibility of a 100-year

[21] Had the Government appealed this decision, it appears it would have been successful in obtaining a reversal, for the Seventh Circuit reversed *Lauer* in a case subsequent to Ewell's, *Collins* v. *Markley,* 346 F. 2d 230 (C.A. 7).

term and a $60,000 fine under the new indictment. As the trial court found, this action was apparently motivated by the "express concern of the prospective liberation of a number of similarly convicted narcotics felons . . ." (R. 25).

It would thus appear that the Government in its concern over the effect of the *Lauer* decision decided, in lieu of appealing that decision, to discourage other defendants' reliance upon it by the re-prosecution with additional counts of defendants who successfully attacked their convictions. Whether this was actually the intent of the Government makes little difference, for the effect of this course of action was obviously to discourage similarly situated defendants from exercising their right under 28 U.S.C. 2255 on the basis of *Lauer*.

The Government perhaps may have the right not to appeal a decision which it considers incorrect and a dangerous precedent, such as *Lauer*. Where it voluntarily chooses not to do so, however, the Government must recognize and assume responsibility for the prejudice which may result from the "inconsistencies in the developing law" which the trial court found to exist here (R. 25). The burden and the risk of such prejudice must be borne by the Government, not the accused. To permit the Government, in effect, to collaterally attack a decision which it has chosen not to appeal and thereby discourage defendants from exercising their statutory right to attack their convictions collaterally on the basis of that decision, is against the best interests of society at the very least. One cannot help but note that the language in *United States* v. *Tateo*, 377 U.S. at 466 quoted by the Government (Brief, p. 11) with but a slight modification could be paraphrased as follows:

> From the standpoint of the defendant, it is at least doubtful that Appellate Courts and district courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would place the defendant in a worse situation than he was prior to availing himself of the rights afforded him.

The conduct of the Government in this instance would appear to simultaneously work against society's interest in erasing bad precedents and society's interest in giving the defendant a means to set aside an unlawful conviction. There is also a distinct possibility that the Government's action is unconstitutional on the ground that it makes the exercise of constitutional and statutory rights costly to the defendant who exercises them. *Griffin* v. *California*, 380 U.S. 609, 614.[22]

This question aside, there is no doubt that the defendant's situation as it was examined by the district court could only have resulted from the four decisions of the Government listed above. As if walking through a maze having only one path, the Government took the only turn at each of four intersections which could have led to the defendant's prejudice. Had it originally indicted the defendant under 26 U.S.C. 4704(a), or had it appealed *Lauer* and overturned it, had it appealed the district court's decision to set aside Ewell's judgment and conviction to the Seventh

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[22] For a persuasive argument that action by government or court which puts a defendant in a worse situation than he was before a successful appeal or a collateral attack is unconstitutional on several grounds. See "In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant." Van Alstyne, 74 Yale Law Journal 606 (1965).

Circuit and then to this Court if necessary, or had it re-indicted Ewell only on 26 U.S.C. 4705(a), this case would not now be here.

Whether each of these decisions was part of a purposeful attempt to deny the defendant his constitutional rights, or might possibly be justified on some independent ground completely removed from any consideration of this particular defendant is immaterial.[23] There is no denying that the situation which the district court found to violate the defendant's rights to a speedy trial and to be informed of the nature and cause of the accusation against him was a direct result of the voluntary conduct of the Government. It is this conduct, and the resulting prejudice, which requires the affirmance of the decision of the district court.

IV.

The Second Indictment Charging a Violation of 26 U.S.C. 4704(a) Violates the Double Jeopardy Protection of the Fifth Amendment.

It was argued in the district court that the prosecution under the second indictment violated the double jeopardy clause of the Fifth Amendment as well as the Sixth Amendment (R. 3). The district court ruled against the defendant on that question. The defendant maintains that the proceedings, in addition to violating the Sixth Amendment rights to a speedy trial and to be informed, also constitute double jeopardy.

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[23] The finding of the district court that the only known reason for the three-count second indictment was "the expressed concern of the prospective liberation of a number of similarly convicted narcotic felons" (R. 25) remains uncontroverted by the Government.

It is recognized that the defendant does not have the right to appeal the adverse decision of the district court concerning double jeopardy directly to this Court, but, since every fact needed to decide this issue is in the record presently before this Court, the defendant now requests that if the Court does not find any violation of Sixth Amendment rights, to now consider this question. This Court has discretion to do so if it desires. *Pollard* v. *United States,* 352 U.S. 354, 359.

The proceeding in the district court shows that the original indictment against the defendant was in one count charging a violation of 26 U.S.C. 4705(a). The Government has appealed the dismissal of Count II in the second indictment charging a violation of 26 U.S.C. 4704(a).[24]

It has been stated by this Court that successive prosecutions arising out of the same act are prohibited by the Fifth Amendment even though the prosecutions are under different Federal statutes and require different elements of proof. *Abbate* v. *United States,* 359 U.S. 187, 196-199 (Separate Opinion); *Petite* v. *United States,* 361 U.S. 529, 533 (Separate Opinion); see also *In Re Neilson,* 131 U.S. 176. The reasoning of these opinions is that the Fifth Amendment protects the individual from the harassment of successive trials for the same criminal acts. Mr. Justice

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[24] In view of the Seventh Circuit opinion in *Collins* v. *Markley,* 346 F. 2d 230 (C.A. 7), overruling *Lauer* and holding that the omission of the name of a purchaser from an indictment charging a violation of Title 26 U.S.C. 4705(a) was not a defect of such a fundamental nature as to render a judgment of conviction vulnerable to collateral attack, it appears that the district court did not have jurisdiction to set aside Ewell's original conviction. It thus might also be argued that Ewell's first indictment has been valid all along and the second indictment under 4705(a) clearly places the defendant twice in jeopardy.

Brennan reasoned in *Abbate* that to allow successive prosecutions for the same act would, in effect, remove the discretion in sentencing a defendant to consecutive or concurrent terms from the hands of the trial court and put it in the hands of the prosecution. Without the protection of the Fifth Amendment, the Government could use such a weapon to harass and wear down the defendant with trials seriatim.

In *United States* v. *Sabella,* 272 F. 2d 206 (C.A. 2), this reasoning was applied to a case factually similar to the present one. In that case the defendant had pleaded guilty to a charge of selling narcotics in violation of 26 U.S.C. 4705(a) and was sentenced to four years in prison. It was subsequently discovered that Congress had inadvertently omitted to prescribe punishment for a violation of this section and, at the time the defendant was sentenced a corrective law was not yet in effect. The defendant filed a habeas corpus petition to set aside the sentence after serving approximately seven months in prison. The order of the court through inadvertence set aside not only the sentence but the judgment as well. The defendant was reindicted eight days later and charged with a violation of 21 U.S.C. 173, and 174 although this prosecution was admittedly for the same acts involved in the first indictment. Referring to the language in *Abbate,* the district court held that the second indictment violated the double jeopardy clause of the Fifth Amendment and stated the following (p. 212):

> "The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain set fact situation, there can be no further prosecution of the fact situation alone: The defendant may not later

> be tried again on that same fact situation, where no significant additional fact need be proved, even though he be charged under a different statute. He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. Here there was one sale of narcotics. The Government should have but one opportunity to prosecute on that transaction. Although in such a prosecution it may join other charges based on the same fact situation, it may not have the succession of trials seriatim."

The present prosecution against the defendant Ewell points out an additional reason why the Government should not be allowed to indict a defendant on subsequent counts not included in the original indictment. Here, whether by design or not, the Government has used the two additional counts held back from the first prosecution to increase the possible punishment under the second indictment. This conduct also makes it extremely difficult to defend against the new charges because of the delay involved. As the district court found (R. 25), this action can only have the effect of discouraging collateral attack. See this Brief, pages 34-37 *supra*.

The prosecution under Count II is therefore barred by the Fifth Amendment.

Conclusion

For the reasons stated, the defendant respectfully submits that this appeal should be dismissed because it does not present a case or controversy.

For the reasons stated, the defendant further respectfully submits that this Court affirm the judgment below on the grounds that:

A. The defendant has been denied his right to be informed of the nature and cause of the accusation guaranteed by the Sixth Amendment.

B. The defendant has been denied his right to a speedy trial guaranteed by the Sixth Amendment.

C. The proceedings against the defendant under the second indictment violate the double jeopardy clause of the Fifth Amendment.

Respectfully submitted,

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